STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MONTRELLE LAMONT CAMPBELL,

APPELLANT,

APPELLATE CASE NO. 2018-000115

Opinion No. 5885 (Filed December 22, 2021)

PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, counsel for Respondent petitions this Court for rehearing. Counsel respectfully submits that this Court has misapprehended certain factual and legal matters in arriving at its holdings. Respondent would respectfully argue:

Section I. Inferred Malice

1. In Section I of the Opinion, due to the Court's focus upon *Brooks*, it is not clear as to whether this Court's consideration and reversal of the trial court's inferred malice by use of a deadly weapon instruction applies strictly to the attempted murder conviction, or to both the attempted murder conviction and the murder conviction. The issue asserted by Apellant was explicitly limited to the charge of attempted murder. Respondent would argue that the opinion should be so limited, but would request clarity as to the matter.

2. This Court's application of law for attempted murder is in contradiction with its recent decision reached four months ago in *State v. Taylor*, 434 S.C. 365, 370, 862 S.E.2d 924, 927 (Ct. App. 2021), reh'g denied (Sept. 28, 2021) and is in contradiction to the clear language of S.C. Code Ann. § 16-3-29 (2015). In this Court's Opinion, the Court "agreed" with its summarized argument of Appellant that attempted murder "requires both express malice and a specific intent to kill. . ." However, in *Taylor*, this Court noted that "when our supreme court spoke of implied malice in *King*, it was speaking of malice implied by operation of law, not of the jury's ability to infer malice based on its view of certain facts."

3. This Court considered Respondent's arguments for express malice to be limited to "evidence that Campbell had recently hit Katrina, Campbell drove across town in his girlfriend's car, and fourteen rounds were fired from the rifle into Katrina's apartment."

This Court misapplied the standard for express malice and undercut the presence of express malice set forth within the record in a number of critical ways:

a. This Court held that "Campbell's previous altercation with Katrina and Campbell driving across town is not a total disregard for human life like the defendant in *Brooks* displayed." Such language is one of the ways in which malice may be *inferred*, it is not the standard for which express malice is judged. "Express malice exists as positive evidence of a deliberate intention to unlawfully take the life of another", and our courts have for more than a century instructed that evidence of prior grudges, lying in wait, lying in ambush, and evidence of preparation are evidence of express malice. See *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020); *State v. Judge*, 208 S.C. 497, 506, 38 S.E.2d 715, 720 (1946); *State v. Strickland*, 147 S.C. 514, 145 S.E. 404, 405 (1928), overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *State v. Alford*, 264 S.C. 26, 32, 212 S.E.2d 252, 254 (1975), overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (citing 40 C.J.S. Homicide s 209). Suggesting that Appellant's prior physical attack upon Katrina and his driving across town do not satisfy a "total disregard for human life" standard is to misconstrue the nature of evidence demonstrating express malice.

b. Though this Court itemized "someone firing a weapon fourteen times" as one of the State's many examples of express malice, this Court provided no explanation for why it is or is not evidence of express malice – effectively disregarding it entirely in its reasoning. Shooting 14 times into a crowded apartment *is express malice*.

c. Having listed only the above three indications of express malice, this Court disregards the additional evidence of preparation in that the shooter 1) took someone else's car without permission during the early morning hours so as to commit the crime, 2) acquired the services of a friend[1] to park his getaway car away from the scene, 3) arranged it so that his friend would serve as a getaway driver, 4) walked on foot in the early morning hours to Katrina's location while carrying with him a rifle, 5) committed the crime in a "lying in wait/lying in ambush" manner, such that the victims were unaware of his presence and intentions, 6) ran from the scene without concern for the well-being of the apartment's occupants – constituting positive evidence of his deliberate intention to take life, and 7) ran back to the getaway vehicle and had his friend drive from the scene.

   i. Each of these actions is a separate and distinct portion of the shooter's planning and preparation for the shooting, and they each constitute evidence of express malice. However, none of these facts were considered by this Court.

   ii. To conclude that the jury "may have found malice based solely on the use of a weapon" is to presume that the jury disregarded its instruction by the court as to the nature of express malice. This is inconsistent with the well-settled presumption that the jury will obey the instructions of the court. *Parker v. Randolph*, 442 U.S. 62, 73, 99 S. Ct. 2132, 2139, 60 L. Ed. 2d

[1] The State's theory of the case is that this friend is Trivell Richardson, but Respondent argues the video does not provide absolute proof as to which culprit is which, leaving Richardson the possibility of switching his role in the crime with that of Appellant's, and making an accomplice liability charge necessary. (*Infra*).

713 (1979), abrogated on other grounds by *Cruz v. New York*, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987) ("A crucial assumption underlying that system [of trial by jury] is that juries will follow the instructions given them by the trial judge."); See also *Aldrich v. S. Ry. Co.*, 95 S.C. 427, 79 S.E. 316, 320 (1913); *Coogler v. Thompson*, 286 S.C. 168, 169, 332 S.E.2d 215, 216 (Ct. App. 1985).

iii. This Court has reached a conclusion that an undeniable, premediated, ambush style, "hail of gunfire" attack upon a crowded apartment of unsuspecting victims – lacks evidence of malice beyond the mere fact that the culprit used a deadly weapon. The law should not stand for such a conclusion, and such a conclusion is not supported by the record.

4. This Court *explicitly conceded the fact that evidence of express malice was presented by the State*, when it stated: "In the present case, the evidence of express malice is significantly less than the amount in *Brooks*." The element of malice is not one that must be satisfied "by degree". The satisfaction of the element is judged strictly by its existence or nonexistence in the evidence. Thus, a charge on inferred malice cannot be said to have contributed "to the verdict" when the record has been said to include evidence of express malice. The jury does not need both for its verdict. See *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020) (parenthetically summarizing its holding in *Wilds* that "malice need be implied *only if there is no positive evidence of express malice*.") (emphasis added).

5. This Court improperly compared Respondent's arguments for express malice to the analysis and reasoning set forth in *State v. Brooks*, which discusses exclusively the presence of inferred malice. Thus, the comparison was improper as a matter of law.

6. However, even if *Brooks* were to be compared to the case at hand, this Court in *Brooks* reasoned that since the trial court also instructed the jury that malice could be inferred from conduct showing a total disregard of human life, the record did not demonstrate that the "only" evidence of malice was derived from the improper "implied by use of a deadly weapon charge." This Court further reasoned that "[a]side from his mere use of a deadly weapon, Appellant's reckless behavior began with a hail of gunfire" upon multiple targets.[2] Though clearly present in *Brooks*, this Court gave no such consideration or reasoning to the case at hand. This Court also gave consideration to Brook's effort to flee the scene, but failed to give any consideration to Appellant's effort to flee. The most stark differentiation between the two cases is that in *Brooks* this court concluded: "[T]he circuit court's "commentary" on the use of a deadly weapon in the present case could not have eclipsed the impact of Fred's powerful testimony that he raised his hands to show he was unarmed and this capitulation had no effect on Appellant." This Court seemed quite moved by such circumstances, but was apparently unmoved by the fact that the victims in this case were all unarmed and completely unaware of the "hail of gunfire" that was to fall upon them.

[2] The facts in *Brooks* arguably demonstrate *less malice* as the number of potential victims was far less than those present at Katrina's crowded apartment, and the victims in *Brooks* were able to see Brooks approach and see his actions to shoot at them. The shooter in this case made concerted efforts to ensure that his attack was purely by ambush.

Section II. Accomplice Liability

1. This Court concludes that Richardson was the driver and that Appellant was the shooter, when the only distinguishing proof as to which culprit performed the role of shooter, is the testimony of Richardson himself, who has every reason to try and limit his own culpability. This Court disregards the possibility that if the jury were not convinced beyond a reasonable doubt as to which culprit on video was carrying the gun toward the scene of the crime, they need not differentiate if they were certain both men were aware of and perpetuating the crime together. The record is "equivocal" as to this point, as Richardson's various statements to police demonstrate prior dishonesty on the question of his identity. Such, by itself, satisfies the minuscule "any evidence standard" that would warrant the charge from the court.

2. In addition to the clear accomplice relationship between Appellant and Richardson, that lacks indisputable proof of the identity of the shooter, the record also contains evidence of the unidentified hooded individual who was seen leaving the shooting carrying a rifle and fleeing in a different car. Despite the "any evidence" and the "abuse of discretion" standards it must overcome to find reversible error by the trial court, this Court concluded that there was no equivocal evidence that that Appellant was working with the man seen by Ms. Blake. This Court appears to infer that "direct" evidence of an accomplice relationship is required. It is not; circumstantial evidence will suffice. *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (noting that no "formally expressed agreement" is necessary and that the conspiracy may be shown through circumstantial evidence and the conduct of the parties. Here, the remarkable fact that two

different individuals were seen fleeing the same scene while carrying rifles, *at the precise moments following a massive shooting committed by rifle fire*, is undeniable circumstantial evidence that the two individuals could have been working together. To suggest the jury could not believe both the video evidence and the testimony of Ms. Blake is to disregard the maxim that "it is always for the jury to determine the facts, and the inferences that are to be drawn from th[o]se facts. *State v. Burdette*, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019)(quoting *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013)).

3. Moreover, that particular inference – that there were two shooters at the scene – is corroborated by other evidence that this Court omitted from its analysis and conclusion. Two separate cell phones were found at the scene of the crime. (R. p. 157-158). This bolsters the inference that *two people were at the scene* of the crime. Additionally, the 14 recovered shell casings were not all of the same manufacturer, which bolsters the inference that *two guns were at the scene* of the crime. (R. p. 134-135). Lastly, the evidence in the record does not inform the jury that these 14 rounds were all fired from the same firearm, permitting the *inference that two guns were fired* at the scene of the crime. Any and all of which are sufficient to satisfy the any evidence standard warranting the charge given by the trial court in this case.

CONCLUSION

Based upon the above arguments, Respondent asserts that this Court has misapprehended certain facts and law that led to an improper result in this case. Respondent respectfully petitions for rehearing on this matter, and that for all of the foregoing reasons, the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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January 6, 2022.

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PROOF OF SERVICE

I, **Donna D'Alessio,** am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing has been forwarded to Petitioner's counsel, Lara M. Caudy, Esq. via email today, January 6, 2022, to lcaudy@sccid.sc.gov, and to her assistant, lmatthews@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 6th day of January, 2022.

Donna D'Alessio

Donna D'Alessio,
Legal Assistant to W. Joseph Maye,
Assistant Attorney General

ATTORNEY FOR RESPONDENT